OLC 74-0981

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9 May 1974

MEMORANDUM FOR: Office of Legislative Counsel

ATTENTION: [redacted] STATINTL

SUBJECT: Comments on S. 3399

1. Senator Metcalf's proposed bill, S. 3399, to amend the Freedom of Information Act to provide for the classification and declassification of official information in the interest of national defense, if enacted in its present form, would seriously impair the Agency's ability to perform its mission and functions and would make it virtually impossible for the DCI to fulfill his statutory responsibilities under the National Security Act of 1947, as amended, particularly his responsibility for protecting intelligence sources and methods from unauthorized disclosure. If this bill is given serious consideration by Congress, it is our position that we must seek an exemption from the bill.

2. Section 5(b) of Executive Order 11652 provides for exemptions from the General Declassification Schedule for certain classified information as follows:

a) Classified information or material furnished by foreign governments or international organizations and held by the United States on the understanding that it be kept in confidence;

b) Classified information or material specifically covered by statute, or pertaining to cryptography, or disclosing intelligence sources or methods;

c) Classified information or material disclosing a system, plan, installation, project or specific foreign relations matter the continuing protection of which is essential to the national security, and

d) Classified information or material the disclosure of which would place a person in immediate jeopardy.

3. Any materials or information exempted under the above provisions are subject to mandatory review after ten years (10) from the date of origin. At that time a determination is made by the originating agency whether the material should be declassified or continue to be classified. In the latter case, the material would not need to be declassified until the expiration of thirty (30) full calendar years from the date of its original classification. Even then, the head of the originating department could require continued protection if he determined that such continued protection was essential to the national security or disclosure would place a person in immediate jeopardy.

4. The provisions in S. 3399 dealing with declassification of national security information would significantly reduce the number of years that classified information could be protected and would, for all practical purposes, nullify E. O. 11652.

5. The proposed new subsection, 5 U.S.C. 552 (e)(1)(B)(ii), to the Freedom of Information Act provides that any official information, with certain exceptions discussed below in paragraph 8, which was originally classified in the interest of national defense, as Top Secret, Secret, or Confidential during the fifteen-year (15) period preceding the effective date of the Freedom of Information Act Security Classification Amendment of 1973 shall be downgraded or declassified according to a declassification schedule contained elsewhere in the act.

6. Moreover, 5 U.S.C. 552 (e)(1)(C) provides for automatic declassification of any official information classified in the interest of the national defense prior to the fifteen-year (15) period immediately preceding the effective date of the Freedom of Information Act Security Classification Amendment of 1973. Under this provision classified materials predating 1958 would be automatically declassified, with certain exceptions discussed below in paragraph 8.

7. The declassification schedule in the bill provides essentially that Top Secret information shall be downgraded to Secret in one year, Secret information to Confidential in one year; Confidential information shall be declassified after the expiration of a year, with the following exceptions.

8. The proposed subsections 5 U.S.C. 552 (e)(3)(A), (B), (C), & (D) provide that information which is classified Top Secret and is specifically exempted from disclosure by statute, or pertains to cryptographic systems, or would disclose intelligence sources or methods, or special defense information, shall be exempted from the above declassification schedule. Such information shall be downgraded to Secret in one year, but, the Classification Review Commission (which would be established by S. 3399) may, by majority vote of its full membership, allow such information to continue to be classified at the Secret level for a period of 24 months from the date it was downgraded to Secret, and then -- again by majority vote of the Commission -- may continue the Secret classification for an additional 12 months, and finally, by a two-thirds (2/3) vote, continue the Secret classification for another 12 months. The information would then be downgraded to Confidential and, one year later, declassified, unless the President in writing provides the Commission with detailed justification, based on national defense interests, for maintaining the Secret classification. Even so, the Commission, by a two-thirds vote, could reject such justification.

9. From the above it appears that the maximum protection the exempted Top Secret information could receive under this bill would be one year at the Top Secret level, five years at the Secret level -- at the discretion of the Commission -- and one year at the Confidential level; or a total of seven years from date of classification to date of declassification. Seven years is, of course, considerably less protection than the ten to thirty years of protection now provided by E. O. 11652. Obviously, the Agency cannot live with the declassification provisions of S. 3399. It would be impossible to retain the confidence of foreign governments or agents under such circumstances. Moreover, it would be impossible for the DCI to meet his statutory responsibility to protect intelligence sources and methods from unauthorized disclosure if highly sensitive information could only receive a maximum -- and not even a guaranteed maximum -- of seven years' protection.

10. Another new subsection (5 U.S.C. 552 (f)) would be added to the Freedom of Information Act establishing a Classification Review Commission, composed of nine high ranking members. The Commission would be provided broad authority for a) prescribing standards and procedures for handling national defense information, b) dissemination of such information throughout the Government and the intelligence community, c) accountability for the information, d) subpoena authority, etc. As already indicated above, the Commission would also have the authority to decide by majority, or in certain instances two-thirds vote, whether national defense information should be declassified or not. In addition, the Commission would be given the authority to conduct a "thorough and continuing investigation and appraisal of the policies, standards, and operations of agencies classifying information, in the interest of national defense. . . ." The Commission would also be used as a vehicle to furnish to Congress, Committees of Congress, and the Comptroller-General of the United States, upon request, certain classified information necessary for Congress to discharge fully and properly all of its constitutional responsibilities.

11. In addition to the obvious sources and methods problems created by such broad grants of authority to the Commission, it is clear that the DCI's statutory responsibilities under the National Security Act of 1947 to provide for the appropriate dissemination, correlation, and evaluation of intelligence within the Government would be so eroded by the bill as to render his responsibilities meaningless.

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STATINTL

Assistant General Counsel

Attachment
S. 3399